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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LES HADLEY ..... *Petitioner*

vs.

NORTH ARKANSAS COMMUNITY
TECHNICAL COLLEGE ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CORRECTLY CONSIDERED (a) WHETHER A JUDGMENT AGAINST NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE WOULD IMPACT THE STATE TREASURY AND (b) THE DEGREE OF LOCAL CONTROL AND AUTONOMY ENJOYED BY NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE, IN DECIDING THAT NORTH ARKANSAS COMMUNITY TECHNICAL COLLEGE IS AN "ARM OF THE STATE" ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully urges the Court to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 14, 1996. *Hadley v. North Ark. Community Technical College*, 76 F.3d 1437 (8th Cir. 1996) Pet. App. 3a.

STATEMENT OF THE CASE

On June 7, 1994, Les Hadley filed an action against North Arkansas Community Technical College (hereinafter "NACTC"), pursuant to 42 U.S.C. §1983. In his complaint, Hadley alleges that his constitutional due process rights were violated in connection with his termination from NACTC. Hadley also alleges a pendent state claim for breach of contract and seeks unspecified compensatory damages, punitive damages, reinstatement, attorneys' fees and costs.

In its answer, filed June 28, 1994, NACTC denied the merits of Hadley's claims, and affirmatively plead, among other things, that it was entitled to Eleventh Amendment immunity. On October 7, 1994, NACTC moved for summary judgment asserting Eleventh Amendment immunity from Hadley's federal claim.

The district court denied NACTC's motion for summary judgment, finding that NACTC was not a state entity for Eleventh Amendment purposes, relying upon *Parsons v. Burns*, 846 F. Supp. 1372 (W.D. Ark. 1993), appeal dismissed, No. 94-2798 (8th Cir. Aug. 17, 1995). NACTC took an interlocutory appeal to the Eighth Circuit Court of Appeals from the order denying immunity. The district court order was vacated and remanded for development of a detailed factual record on the issue of Eleventh Amendment immunity. Pet. App. 28a-29a. Upon submission of supplemental briefs and supporting affidavits, the district court, on remand, found that NACTC is a state entity for Eleventh Amendment purposes and granted NACTC's motion for summary judgment. Pet. App. 53a.

Funds for the "general operation of an adequate comprehensive educational program" of community

colleges in Arkansas are provided by the state. Ark. Code Ann. §6-61-601(a) (1987). Community Colleges may levy millage to provide additional operation funds. *Id.* The tax is limited to ten (10) mills on the taxable real and personal property in the district. Ark. Code Ann. §6-61-503(a) (1987).

NACTC's total budget for the 1993-94 fiscal year was $10,635,172.00, of which state funding provided 58.2% and local taxes provide 3%. Pet. App. 39a. For the same year, the "operating budget" of NACTC was $6,342,250.00, of which state funding provides 75.1%, and local taxes provide no funding. Pet. App. 62a.

NACTC, as a part of the system of higher education, is characterized by state law as an agency of the state and is under the supervision of the State Board of Education. Pet. App. 50a. While many of the functions and decisions of NACTC are within the control of the local elected board, the local board must operate within the guidelines and under the supervision of the State Board of Education which is comprised of members appointed by the Governor. *Id.* Additionally, NACTC must be operated within numerous other state guidelines. *Id.*

Upon submission of supplemental briefs and a supplemental record relating to the new opinion of the district court, the Court of Appeals entered an order affirming the district court. Pet. App. 3a.

Hadley filed a Petition for Rehearing with Suggestion for Rehearing En Banc which was denied.

REASONS FOR DENYING THE PETITION

I.

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S ELEVENTH AMENDMENT IMMUNITY CASES AND DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

The petitioner claims that the decision of the Court of Appeals in this case, that NACTC is an arm of the state entitled to Eleventh Amendment immunity, conflicts with decisions of this Court. Petitioner cites *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) and *Hopkins v. Clemson College*, 221 U.S. 636 (1910) as the Supreme Court decisions with which the decision below conflicts.

Petitioner claims that the Court of Appeals applied a "bright ling 'impact rule' " that conflicts with *Mt. Healthy* and *Hopkins*. Petition, p. 12. Petitioner summarizes the Court of Appeals' reasoning in one sentence:

> The Court of Appeals reasoned that because 58.2% of NACTC's budget was provided by "state funds appropriated by the General Assembly . . . it seems clear that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley would inevitably be paid from the state treasury. Pet. App. 8a."

Petition, p. 10. Contrary to petitioner's assertion, the Court of Appeals did not begin and end its analysis of whether NACTC was an arm of the state by looking solely to the percentage of state funding that makes up NACTC's budget. After an evaluation of the nature of NACTC as created by state law, as well as consideration of the amount of state revenues received by NACTC, the Court of Appeals

states: "[*t*]*o this point,* it seems clear that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley would inevitably be paid from the state treasury." Pet. App. 8a. The Court of Appeals continues, two sentences following the above quote, by stating "[b]ut Arkansas Community Colleges also have elements of local funding and control that require further analysis." Pet. App. 8a. The Court of Appeals then undertakes a detailed analysis of the degree of local funding and control afforded NACTC. Read in context, the court below simply makes the point that the percentage of state revenues that comprise NACTC's budget is a consideration in determining whether an entity is entitled to Eleventh Amendment immunity.

The decision of the Court of Appeals is consistent with this Court's decision in *Mt. Healthy*. In *Mt. Healthy*, 429 U.S. 474, 280 (1977), this Court stated that whether an entity was an arm of the state depended "at least in part, upon the nature of the entity created by state law." It concluded that even though the City Board of Education received state funding, because Ohio law defined a local school district as a political subdivision and granted the Board the power to raise its own money, the Board could not be considered an arm of the state entitled to Eleventh Amendment immunity. *Id.* at 280-81. The decision below is consistent with the rationale contained in *Mt. Healthy*, as well as *Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391 (1979) and *Hess v. Port Auth. Trans-Hudson Corp.* ___ U.S. ___, 115 S.Ct. 394 (1994). The decision below is a careful and thorough analysis of the factors annunciated in these Supreme Court cases.

The claim that the decision below "directly conflicts" with *Hopkins v. Clemson College*, 221 U.S. 636 (1910), is without merit. *Hopkins* predates *Mt. Healthy, Lake*

Country and *Hess* by several decades and is not a valid comparison. Undoubtedly, the more recent Supreme Court decisions concerning Eleventh Amendment jurisprudence are controlling. Accordingly, the decision of the court below is consistent with this Court's decision in *Mt. Healthy*.

The petitioner also claims that the court below has created a split between the Eighth Circuit and the Third, Fifth and Tenth Circuits "[b]y using the percentage of state funding to mechanically trigger an 'impact rule'." Petition, p. 13. The petitioner cites cases from each of these three circuits, and provides the percentage of state funding provided to the institutions in question, for his contention that these circuits have rejected an "impact rule." Petitioner cites *Ambus v. Granite Bd. of Ed.* 995 F.2d 992 (10th Cir. 1993) (defendant's claim of immunity rejected by entity receiving 62.2% of its budget from state appropriations); *Farias v. Bexar County Bd. of Trustees for Mental Health and Mental Retardation Services*, 925 F.2d 866 (5th Cir. 1991) (claim of immunity rejected by entity receiving 70 to 80% of its funding directly or indirectly from state); and *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303 (3rd Cir. 1987) (claim of immunity rejected by entity receiving 50 to 70% of its general operating account from state appropriations).

It is unclear exactly what Petitioner means by the assertion that the court below used an "impact rule." The Court of Appeals did not employ a rule that mechanically triggers immunity based upon a particular percentage of state funding that makes up an entity's budget. However, the Eighth Circuit, as well as all other circuits, considers whether a judgment against the entity in question would impact the state treasury. *See Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Sherman v. Curators of the University of Missouri*, 16 F.3d 860 (8th Cir. 1994); *Treleven v. University*

of Minnesota, 73 F.3d 816 (8th Cir. 1996). One factor that may be used to determine whether a judgment against the entity would impact the state treasury is the amount of state funding received by the entity. *Id.*

In its order of remand the Eighth Circuit stated:

> In deciding whether Eleventh Amendment immunity applies to a subdivision of the state, "[c]ourts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury." *Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1995) (quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982); *see Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 863 (8th Cir. 1994).

Pet. App. 26a. The court below did not base its decision to grant Eleventh Amendment immunity to NACTC solely on the amount of state funding received by NACTC. Among many other factors, the court below considered that 58.2% of NACTC's total budget was provided by state funds to determine that, *on balance*, NACTC is an "arm of the state." Similarly, the courts in the *Ambus*, *Farias* and *Kovats* cases did not base their decisions to reject claims of immunity solely on the amount of state revenues received by the entities. These courts analyzed several factors in reaching their decisions.

Accordingly, the decision of the court below does not create a conflict among the circuits.

A. CONSISTENT WITH SUPREME COURT PRECEDENT, THE DECISION BELOW CONSIDERED ALTERNATIVE SOURCES OF FUNDING IN DECIDING WHETHER THE STATE'S PURSE WAS AFFECTED, AND DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

Petitioner claims that the lower court refused to consider whether discretionary non-state sources of income (*e.g.*, taxes and bonds) were available to NACTC, and that this conflicts with other circuits' decisions and this court's decisions in *Edelman v. Jordan*, 415 U.S. 651 and *Hess*. This claim is based on a faulty interpretation of the lower court's ruling in this case. In the per curiam opinion remanding the case back to the district court, the Court of Appeals, citing *Sherman*, stated that "[t]he key inquiry is whether a judgment against the institution must be paid from state funds, or whether it can be paid from nonstate sources under its discretionary control." Pet. App. 26a. In a footnote of the Opinion remanding the case, the Court of Appeals notes:

> we agree with Hadley the mere fact that a higher percentage of NACTC's budget is derived from state funding is not dispositive. The higher percentage does not alone explain why payment of damages to Hadley would necessarily implicate these state funds. Yet, this fact combined with the other facts alleged in the president's affidavit may support a conclusion contrary to the one in *Parsons*.

Pet. App. 27a-28a. The Court of Appeals made an extensive and detailed evaluation of the evidence to determine whether discretionary non-state sources of income were available to NACTC. Petitioner cites cases from eight circuits for the proposition that the consideration of the presence of alternative sources of funding is essential to a finding (of) whether the State's purse is affected. Petition,

p. 13. Consistent with the decision of the court below, the cases cited by Petitioner do consider the presence of alternative sources of funding as *one* factor in determining whether a judgment on the entity would impact the State's purse. However, this factor alone is not the deciding factor.

Petitioner argues that if a state entity has *some* ability to raise *some* funds independent of its state appropriations, it is not an arm of the state. This is not the test and none of the cases cited by Petitioner stand for that proposition. Undoubtedly most educational institutions have some ability to raise some funds outside of their state appropriations. "The relevant funding inquiry cannot be whether NACTC enjoys some non-state funding, such as user fees (tuition), because then most state departments and agencies, and all state universities, would be denied Eleventh Amendment immunity." *Hadley* at 1441; Pet. App. 12a.

Accordingly, the lower court decisions cited by petitioner as creating a conflict are actually consistent with the decision of the lower court in this case.

B. THE DECISION BELOW CONSIDERED WHETHER A JUDGMENT AGAINST NACTC WOULD IMPACT THE STATE TREASURY.

The petitioner claims that the decision below disregards several discretionary decisions by the defendant and the State relative to the impact any judgment against NACTC would have on the State's purse. The fallacy of petitioner's argument is that the court below did not find that NACTC had sufficient non-state revenues to satisfy a judgment. The Court of Appeals states that "*even if* NACTC *could* initially satisfy a judgment from other operating revenues such as tuition payments or federal grants, the judgment would produce a higher operation

budget shortfall that *must, by state law*, be satisfied by an appropriation from the state treasury." Pet. App. 12a. (emphasis supplied) Furthermore, as discussed above, whether an entity has some ability to raise some funds independent of its state appropriations, is not the test for determining whether or not an entity is an "arm of the state." This factor is one of many to determine whether or not a judgment against the entity would impact the state treasury.

Petitioner claims that the conflict between the decision below and the decision of the Fifth Circuit in *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975), "is particularly stark." Petition, p. 18. Petitioner's reliance on *Hander* is misplaced. Petitioner fails to point out that in *Hander*, the Fifth Circuit determined that junior college districts in Texas are independent political subdivisions not immune from suit. *Hander* at 279. "The Texas common law concerning independent school districts has consistently recognized that these governmental units are, like municipalities, independent political corporations, distinct from the state itself." *Id.* The Fifth Circuit observed that although "the question of whether or not the state is 'the real party in interest' is one of federal law, . . . federal courts must examine the powers, characteristics and relationships created by state law in order to determine whether the suit is in reality against the state itself." *Id.*

Petitioner can point to no Arkansas law which specifically provides that community and/or technical colleges are independent political corporations or subdivisions. To the contrary, the court below found that "Arkansas calls NACTC a state agency and has made its daily operations financially dependent upon the state treasury." Pet. App. 11A. Stated another way, "[t]he State has created an institution of higher learning 'that is

dependent upon and functionally integrated with the state treasury'." *Id.* (internal citations omitted)

II.

THE DECISION BELOW UTILIZED THE APPROPRIATE FACTORS IN EVALUATING WHETHER NACTC IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AS AN ARM OF THE STATE.

The petitioner claims that there is a three way circuit split over the proper factors to be considered in evaluating whether an entity is entitled to Eleventh Amendment immunity. Petitioner goes to great length in setting forth the number of factors the various circuits have developed to analyze whether an entity is an "arm of the state," and thus, entitled to immunity. Regardless of whether a certain circuit uses a four prong test or an eight prong test, all circuits consider two things: one, whether a judgment against the entity would impact the state treasury and two, the degree of local control and autonomy enjoyed by the entity. Merely because different circuits have different components in their tests, does not mean there is a split in the circuits. There are numerous factors a court may utilize to meet the test of deciding whether a judgment would impact the state treasury and to determine the degree of local control and autonomy.

At the end of his brief, the petitioner states that the predominant factor in Eleventh Amendment analysis is the ability of the entity to raise revenue independent of state appropriations and the availability of those funds to pay a judgment. Petition, p. 30. As discussed above, based on this rationale, no state university would have immunity.

The question of whether a particular entity is entitled

to Eleventh Amendment immunity is decided on a case-by-case basis and depends on the individual facts and circumstances of a particular entity. *Greenwood*, 778 F.2d at 453; *Sherman*, 16 F.3d at 863. The decision below involved an individual, fact-specific case about a community college in Arkansas. The district court entered an exhaustive opinion applying the facts to the law. On review by the Court of Appeals, an equally detailed analysis of the facts of this case, as applied to the applicable law, was made. Under the same test another community college may not have immunity, as in the *Parsons* case.

Because Petitioner is disappointed with the decision of the Court of Appeals, he alleges a conflict among the circuits to attempt to obtain review by this Court. Petitioner fails to meet the standards set forth in Supreme Court Rule 10. There is no compelling reason for this Court to review the decision of the Court of Appeals. The decision below does not conflict with the decision of another United States Court of Appeals, nor does it conflict with Supreme Court precedent.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that the Court deny the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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